Supreme Court of the United States

OCTOBER TERM, 1902.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

v.

THE NORTHERN PACIFIC RAILWAY COMPANY.

Reply by Plaintiffs in Error to Supplemental Brief of Defendant in Error.

ARGUMENT.

The incorporation of the act of 1898 as printed in defendant's supplemental brief omits material portions of the act, as evidenced by comparison with the act itself.

See 30 Stat. at Large, 620, c. 546.

The contention under the act by appellants is not "new" in the sense of not being appropriate for appellate court because not raised in lower court.

1st. It was not passed when the lower court heard the cause.

2d. It was a *law*, an act of Congress, at the time of the decision of the supreme court of the State, and as such was entitled to the proper consideration as a law of such force as its provisions created.

3d. It is a granting act specifically addressed to the defendant; the act by which its rights must be adjudged—also the rights of the appellant.

4th. It is one of the sources of title of the appellant and naturally is producible under allegation of title made by appellant affirmatively, and is a limitation on the title claimed by the defendant, which must stand on the strength of its own title.

Seligman *v.* Burgess, 103 U. S.

The facts must be kept in view to appreciate the relationship of this act:

In 1872 the order was made upholding all lands within the limits of general route.

This was void, as opposed to the act of Congress and in violation of the law granting land only on filing map of definite location.

This order was therefore not in pursuance of any statute and was a void thing.

Hewett *v.* Schultze, 180 U. S., 139, etc.

Powers *v.* Slaght, 180 U. S., 173.

The land on "general route" was still open to claims and settlement.

See Sanders *v.* Road, 166 U. S., cited.

N. P. *v.* McCormick, 94 Fed., cited.

In 1881 appellant became a settler in good faith on the land for homestead purposes.

In 1884 the defendant filed for first time its map of definite location, after the "claim and right" of appellant had arisen and existed.

In 1893 the land for the first time was surveyed.

"Immediately thereafter" appellant tendered his appropriate filing. It was rejected. Appeal was taken to General Land Office. Contest for the said land still continuing.

On May 10, 1895, while appellant was in possession under congressional grant of homestead to him, a settler, and with notice of his claim, possession, and contesting position, all of which *antedating* filing map of *definite location*, defendant company took patent, founded on presumed grant by order of General Commissioner upon a filing a general route, and despite the possession and claim of appellant and the attaching to appellant of his homestead, antedating the filing map of definite location.

Thus there was ever a contest—against the road—first, by attempt to file—a contest against the patent by continued possession from proper and anterior date—an existing assertion of right to property despite void patent—issued without jurisdiction.

The Northern Pacific railroad's patent, under these circumstances, conveyed nothing, or at least was only a color of a doubtful title. When Northern Pacific Railway Company sought a congressional subrogation to the rights of the Northern Pacific railroad, it for the first time asked to be made the "successors" of the Northern Pacific railroad.

The Congress could, therefore, qualify this new recognition, or thus for the first time grant to the Northern Pacific

railway, by such conditions as would quiet every form of "existing claim by a *bona fide* settler," add the duty to the company to take all hands off any then contending settler—contending on any ground if in *bona fide* possession—and confirm this settler's claim, particularly so when the patent was issued *subject* to such claim under the facts. This Congress did. It gave title to Northern Pacific railway for first time by congressional grant, and therewith granted unconditionally to *settler* the land he was on.

The company is rewarded for such loss by being given other *unsettled-upon* lands.

The granting act of 1898 by its passage vested such rights as it conveyed to the company, also by the passage and acceptance by the company vested the land in the settler which was under a claim by a *bona fide* settlement.

The Secretary of the Interior is only called on to act *when the company* informs him that the settler still claims and holds on the land. The settler has not to come in and try a case and prove his right. If so, why the act making the possession *bona fide* alone sufficient for title, and the clinging to the land by remaining on it sufficient for the company as a basis to obtain compensation in other lands.

This is the construction of the court construing the act.

Humbird *v.* Avery, 110 Fed., cited.

The construction *ex parte* of the Land Office is of no judicial value. Its construction in a case—the same that was overruled by the Federal court taking jurisdiction of the identical subject is neutralized as a precedent. It is *nil.*

The construction must follow the object of the act.

It was to give any settler the land he had *bona fide* settled

on previous to filing map of definite location, patent or no patent, contest or no contest, and in turn for this absolute grant for peace, economy, and general right in equity.

The company is given land lien—whether coterminous or not coterminous—whether earned by them or not earned by them, providing the same is *unoccupied* and *unclaimed*.

The act gives appellant the land, irrespective of other questions submitted.

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The attempted effort to give effect to a construction of this act in defiance to its purpose by the land officers presents to the writer of this brief the grotesqueness of the serious law.

No one between earth and heaven more than the writer could know as a fact what was intended by the use of certain words in this act.

It fell as the public duty of the writer of this brief to personally prepare and insert those words in the act. But as this court is not a foreign tribunal accepting the expert opinion of the author of a law, it can only recur to the debates of Congress to ascertain what was the atmosphere attending the passage of this law to gather the intent of the act. We therefore cite House Journal, May and July, 1898, subject, Civil Sundry Law.